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In The

Supreme Court of the United States

October Term, 1972

No. 73-421

RICHARD VEED,

Petitioner,

vs.

EDWARD SCHWARTZKOPF, KERMIT HANSEN, KERMIT WAGNER, ROBERT J. PROKOP, ROBERT L. RAUN, ROBERT KOEFOOT, JOHN G. ELLIOTT, JAMES H. MOYLAN, D. B. VARNER and JAMES H. ZUMBERGE,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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BRIEF OF RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

I. Is a state university constitutionally prohibited from providing a forum for the expression of political and personal opinions with financial support of mandatorily assessed student fees?

STATEMENT OF THE CASE

The petitioner, Richard Veed, brought this action challenging the mandatory student fees collection and expenditure at the University of Nebraska, claiming that such system violated his freedom of speech, freedom of association, freedom of religion, freedom of the

press, Fourteenth Amendment due process, Fourteenth Amendment equal protection, Fourteenth Amendment privileges and immunities clause and other "unenumerated private, political, religious and other citizenship rights of plaintiff" under the Ninth and Tenth Amendments of the Constitution of the United States. The action was brought as a civil rights action under 42 U.S.C. § 1983, claiming that the particular defendants, respondents here, who are members of the governing Board of Regents of the University of Nebraska and chief administrators of the University under color of state law violated the above mentioned constitutional rights of Mr. Veed.

Trial was held before the Honorable Warren K. Urbom, Chief Judge of the United States District Court for the District of Nebraska, in Lincoln, Nebraska, in December, 1972. The court held that the Regents and administrators were not constitutionally prohibited from apportioning mandatorily collected student fees for the support of forums for expression of personal or political views. Therefore, Richard Veed's prayer for injunction against the student fee system was denied. The United States Court of Appeals for the Eighth Circuit affirmed, adopting as its rationale, the memorandum opinion of the trial court. Petitioner now appears to have limited his claim and theories to one single proposition. Petitioner now claims that the expenditures of student fees on forums disliked by petitioner, violates the First Amendment free speech clause of the United States Constitution.

SUPPLEMENTAL FACTUAL BACKGROUND

The testimony of some of the witnesses would appear relevant to the question and theory of First Amendment violation, and a brief summary is therefore provided.

Of the three challenged uses of student fee moneys (campus paper, student government and outside speaker

program), the first and the one which seems to have received most attention was the campus newspaper, "The Daily Nebraskan." "The Daily Nebraskan" operates under guidelines prepared by a committee of professional journalists, students and faculty. These guidelines are not an outline for censorship (R. 26-28). All students on the University campus are eligible to apply for positions on the campus newspaper (R. 39). "The Daily Nebraskan" has the functions, according to its present editor-in-chief, James Gray, as (1) a news and opinion forum for the students and (2) to provide an educational experience for its staff (R. 40). Students may write letters to the editor (R. 44-45), and in fact the plaintiff Richard Veed himself has written letters to the editor, one of which was published on the subject of co-ed visitation rights in the student dormitories (R. 90-91). The plaintiff Veed is a regular reader of "The Daily Nebraskan" newspaper (R. 85, 98, 99-100), and admits that he may have learned something from his use of the newspaper. A "publication board" is available for students who have complaints about the policies or particular items in "The Daily Nebraskan" newspaper (R. 146).

With respect to the campus government organization, the Association of Students at the University of Nebraska, Mr. Veed indicated that his only real objection at the time of the trial was that he had no choice whether or not to be a member of that association (R. 86). However, he also testified that at one point in his school career he ran for office in the ASUN and that at another point he considered running for the ASUN Student Tribunal (R. 94-95). Finally, the testimony of Dr. Peter Wirtz, Assistant Dean for Student Development and Coordinator of Student Activities at the University of Nebraska, Lincoln, described four separate ways in which any student at the University

is able to participate in every decision made by the ASUN—he can attend the open public discussion at the Student Senate weekly meeting; he can contact and ask for legislation from the representative of his college at the University; he can participate simply by volunteering to be on any committee of the ASUN; and he can run for office either in the executive, judicial, or legislative branch of the ASUN (R. 142-145).

With respect to the speaker programs objected to by plaintiff Veed, Mr. Veed admitted that he had never helped in the selection of speakers, even though he knew full well how to participate in that task (R. 92-94). Allen Bennett, Director of the Nebraska Union, the student union at the University of Nebraska-Lincoln, set forth in detail the means by which any student at the University who is currently enrolled and carrying a minimum of credit hours can participate in a number of ways in the selection of speakers (R. 127-133).

Finally, one of the respondents, Robert J. Prokop, a regent, testified that the whole issue and area of student fees is under general and extensive study and discussion on the University campuses, both by the Regents as well as by various study groups and committees, as an ongoing part of the administration of the schools (R. 19-24). This point is noted because the area of student fees seems well within the governing responsibilities and duties of the governors and administrators of the University, and generally not a matter for federal court intervention, in the absence of a showing of abuse in a "constitutional" degree and kind.

ARGUMENT AGAINST GRANTING OF CERTIORARI

The Mandatory Student Fees Collection and Apportionment System at The University of Nebraska in No Way Violates the Free Speech Right of Students.

The petitioner Richard Veed bases his petition, ap-

parently, on the First Amendment, claiming that in some manner his freedom to choose his own political and religious life and expression and his freedom of association have been violated. The whole basis for this argument is the theory that paying student fees constitutes enforced support for unwanted ideas, thus violating the freedom "not to express," citing *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 89 Sup. Ct. 733, 21 L. Ed. 2d 731 (1969). The simple response to this argument is that respondents have the obligation and duty under the laws of Nebraska to collect fees and spend them on university education, and that is all that respondents have done here. They have not forced support of any ideas on petitioner. Nebraska Constitution, Article VII, Section 10, provides that:

> The general government of the University of Nebraska shall, under the direction of the Legislature, be vested in a board of not less than six nor more than eight regents to be designated the Board of Regents of the University of Nebraska, who shall be elected from and by districts as herein provided.

Nebraska revised statute section 85-503 (reissue 1966) provides as follows:

> State educational institutions; tuition. All state institutions are empowered to fix tuition and other fees to be paid by students residing in Nebraska.

Finally, the state statutes also set forth the purposes of the University of Nebraska:

> University of Nebraska; object. The object of such institution shall be to afford to the inhabitants of this state the means of acquiring a thorough knowledge of the various branches of literature, science, and arts. Neb. Rev. Stat. Section 85-102 (Reissue 1966).

The opportunities for each student to participate in

the marketplace of ideas are highly developed on the University of Nebraska-Lincoln, campus, and even Richard Veed has grudgingly participated by reading the campus newspaper, writing letters to the editor, running for office in the student government and listening, albeit with some claimed disgust, to outside speakers brought on to campus. While all of these opportunities are provided for participation and exposure to the ideas of other persons, in no way has petitioner Veed been forced to accept, or even to expose his mind to any of these ideas. Nothing in the record will support any other conclusion.

Petitioner's unusual interpretation of *Tinker, supra,* moves him to claim that the mere payment of a fee to a school, part of which is ultimately spent on vehicles for free expression, amounts to a deprivation of petitioner's "right" to remain totally silent. This tack assumes that the only area where educators may expend fee money without the express approval of each of the fee-paying students, is inside the doors of the classrooms. If the *Tinker* case is fairly read, the reader can easily determine that this Court did not there subscribe to so limited a view of education, even in a secondary school. The Court stated explicitly to the contrary:

> The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' [rather] than through any kind of authoritative selection.
>
> The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities

> is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. 393 U.S. at 512, 21 L. Ed. 2d at 741.

The District Court's opinion in this case found that the challenged activities (outside speakers, student newspaper and student organizations) were determined by the respondents to be a portion of the educational process at the University of Nebraska. Petitioner's appendix, pages 23, 24. Nothing in the *Tinker* decision nor in the case of *Meyer v. Nebraska,* 262 U.S. 390, 43 Sup. Ct. 625, 67 L. Ed. 1042 (1923), expressly or implicitly forbids school educators and governing boards from keeping open avenues for free expression on a campus, including the use of student fees to support them.

Numerous cases have upheld student fee uses not popular with every student, against vague constitutional attacks such as that of Mr. Veed. Most recently, in the case of *Chaney v. Ahlgren,* 346 F. Supp. 869 (E.D. Tenn. 1972), the court held that a complaint alleging that conditioning enrollment at the university on payment of "university programs and activities fee" which was used to support, among other things, the student newspaper, the speakers program and the student government association, opposed by the plaintiff, did not state facts constituting a violation of either the due process

or equal protection clauses of the Fourteenth Amendment. The court stated:

> The heart of the plaintiffs' contention appears to be that, since the defendants apply the fees thus collected to purposes which the plaintiffs consider non-educational and to purposes which are undesired by or unpopular with the plaintiffs and a majority of other students within the University, the fee must in some manner violate the plaintiff's constitutional right to due process and equal protection of the laws. While the popularity or unpopularity of an issue may properly address itself to the legislative processes of government, in this case the Board of Trustees, as previously indicated, such matters do not properly address themselves to constitutional issues or to the judicial interpretation thereof. It is apparent that the application by the defendants of the funds derived from the student activities fee is not so unrelated to the operation of the University as to be irrational to the extent of constituting a violation of due process. Provision for student activities, such as student government, student publications, student athletics, student forums, and student entertainment, the matters herein complained of, are not, because of their extracurricular nature or otherwise, so unrelated to the operation of a university as to be irrational and therefore a violation of due process. In the field of public appropriations ". . . the requirements of due process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest." Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 at 514, 57 S. Ct. 868, at 874, 81 L. Ed. 1245 (1937). As is true in the field of public appropriations generally, the same due process rule would be applicable to the more limited field of appropriations for the operation of a university. Due process grants no general authority to the judiciary to substitute its judgment in matters of university appropriations for the judgment of the governing board of the institution.

> It is likewise apparent that the application by the defendants of the funds derived from the student activities fee, while alleged to be unpopular with many if not a majority of the students, is not such a discriminatory application as to render the collection of the fee a violation of any student's right to equal protection of the laws. No allegation is made that the University denies unto any student the right to participate upon an equality with other students in any activity toward which student activity fees are applied. That such activities may be unpopular or even offensive unto students and that students may as a matter of choice elect not to participate therein does not render the activity, nor the appropriation therefor, nor the collection of a fee therefore, a denial of equal protection of the laws. Just as a citizen's election not to use a public school, a public park, a public road, or a public library does not render taxation for such purposes a denial of equal protection of the laws, so a student's election not to participate in an activity financed by student activities fees does not render the assessment of such a fee a denial of equal protection of the laws. *Id.* at 871-72.

Furthermore, the Nebraska Supreme Court has already affirmed summary judgment for essentially the same respondents in a suit brought by the same attorney on behalf of different plaintiff students, alleging essentially the same theories as are presented by petitioner here, as well as state law questions. That case is *Larson v. Board of Regents,* 189 Neb. 688, 204 N. W. 2d 568 (1973). It may be noted that the Nebraska court did direct itself to the federal constitutional objections in great part, and the case would appear to be some authority here, although it was not relied on by the trial court since the state court opinion was issued after this instant case was decided.

Finally, if it be assumed that the respondents Regents and administrators do have some federal constitutional

limitations on their use of student fees, those would only seem to come into play if their use of the fees were far outside the scope of their state educational authority. The following cases demonstrate the breadth of authority of state institutions in using student fees. The language of the Supreme Court of Iowa in *Iowa Hotel Association v. The State Board of Regents*, 114 N. W. 2d 539 (1962), may be pertinent. In that case, the hotel association had challenged the constitutionality of the University collecting student fees and using them to finance the student union facilities. The court held that the expenditure was definitely within the scope of power of the Regents, noting that the purpose of the union was to bring in outside seminars, speakers, and institutes as additional input to the educational process at the University. The court stated:

> The record supports the conclusion of Dr. Hancher, President of the university, that student unions which include facilities such as proposed are "properly a part of an educational institution such as the University of Iowa".
>
> A modern university is not just a number of classrooms where students may learn all they need to know from professors. It must be an inspiration to greater knowledge. It must, through research, explore the unknown. It must learn what others are doing. It must contribute to the general welfare. It must disseminate knowledge beyond the student body through the Extension Division and the Department of Continuing Education. For these purposes it must invite individuals and groups to the campus. Food, housing and entertainment are necessary incidents.

Numerous other cases have sustained the collection of fees notwithstanding the fact that certain students or other individuals disagreed with the use to which the fee money was to be put. For example, a recent case

held that an injunction would not be granted to the plaintiff students against collection and expenditure of their student fees to finance a new football stadium at the Colorado State University. The court concluded, that it would be impossible to require, before an activity fee could be justified, that every student agree with each expenditure or receive an equal benefit from each program or facility contemplated. The plaintiff students' contention that intercollegiate athletics served no educational purpose was also rejected by the court, on the ground that it was the responsibility of the college governing board to decide whether or not intercollegiate athletics contributed to the students' physical, social and mental development and whether such athletics were necessary to promote the objects of the institution, and the court would not disturb the decision made so long as it was within the wide discretionary powers of the Board to decide. *Randall v. Colorado State Board of Agriculture*, Civil Action 19032 (District Court, County of Larimer, Colorado, December 23, 1969) reported in College Law Bulletin, Volume II, Number 5, January, 1970, page 36.

Again, there are numerous cases sustaining the use of mandatory fees for the financing of student activities such as student unions, *Rheam v. Board of Regents*, 161 Okla. 268, 18 P. 2d 535 (1933), and *State v. State Board of Education*, 97 Mont. 121, 33 P. 2d 516 (1934); or for facilities and buildings deemed necessary by the governing college board for the comfort, convenience and welfare of the student body as a whole, *Application of the Board of Regents of the University of Oklahoma*, 195 P. 2d 936 (1948); for parking facilities, *Linnell v. State Department of Finance*, 21 Cal. Rptr. 785 (1962).

In other words, respondents submit that the petitioner has failed to show any proof that the activities they

wish to *silence* are even non-educational, let alone unconstitutional in any way. In this regard, the case of *Bailey v. University of Minnesota*, 187 N. W. 2d 702 (1971) appears to be precedent for rejecting petitioner's request to have the court countermand the decisions made by the Regents of the University of Nebraska. In that case, the plaintiff was dissatisfied with various student activities and demonstrations on the campus, and asked the court to take over control and countermand the judgment of the Board of Regents of the University. The trial court dismissed the case on the pleadings on the ground that the discretion of the governing body of the University was not to be easily tampered with in the courts, and that there was no ground to justify intervention of the court. Affirming, the Supreme Court of Minnesota stated the case as follows:

> From the foregoing cases it is quite clear that the courts must be reluctant to invade the sphere of authority reserved to the regents by our constitution. A case may arise where they have exceeded their authority, but any court action must be limited to a remedy of that particular abuse. One can scarcely conceive of a case in which the courts could be asked more squarely to deprive the regents of their governing powers than in the case at bar, in which plaintiffs have asked the court to assume continuing jurisdiction over the "authorized uses of the property, facilities and endowments of the University" and to issue orders related thereto "from time to time as may be appropriate." *Id.* at 703-704.

CONCLUSION

Petitioner's entire theory depends on inverting both the principles and holding of the *Tinker* decision. Further, his argument requires an archaic view of education as consisting only in the spoon-feeding of material

by teachers to students by lectures and testing, chalk and blackboard, and exclusively within the confines of a "classroom." Necessarily, and legitimately, the learning process at a modern state university such as that administered and governed by the respondents requires a broader concept of education and *at least* a campus-wide "classroom." Petitioner has never been forced to give up one of his views; on the contrary he has been provided with places to stand and speak his views and be heard. Such a use of student fees does not violate the First Amendment. It helps preserve that "first" law of this country. The petition should be denied.

Respectfully submitted,

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